IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

DOMINIC CONSTANTINE MONTAGUE,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

On Writ of Error to the United States District Court for the District of Idaho, Northern Division.

ATTORNEYS FOR PLAINTIFF IN ERROR.

W. B. McFARLAND,
Coeur d'Alene, Idaho.

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608 Hyde Building,
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INLAND-AMERICAN PTG. CO.

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STATEMENT OF THE CASE.

The defendant was indicted by the Grand Jury sitting at Coeur d'Alene, State of Idaho, on the 24th day of May, 1921, under the charge of unlawfully dispensing narcotics, in violation of Act of December 17, 1914; the charging part which is as follows:

"On or about the 6th day of April, A. D. 1921, at Colburn, in Bonner County, Idaho, and in the Northern Division of the District of Idaho, Dominic Constantine did then and there deal in, dispense, sell and distribute certain compounds and derivatives of opium and coca leaves, to-wit, morphine sulphate and cocaine hydrochloride, without first having registered with the Collector of Internal Revenue for the District of Idaho his name and place of business and place or places where such business was to be carried on, as required by law.

"Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

That thereafter and during the month of July, 1922, the defendant was arrested and taken before the District Court of the United States for the District of Idaho.

(R. pp. 7-8.)

The case was regularly set for trial, came on for hearing before the Hon. Frank S. Dietrich, Judge of the United States District Court, at Coeur d'Alene,

Idaho, November 27th, 1922, at which time a demurrer was interposed to the indictment and overruled, after which the defendant entered his plea of Not Guilty of the charge. (R. p. 9.)

A jury was regularly impaneled, the Assistant United States District Attorney in opening statement to the jury stated what the Government intended to prove, viz. That a Great Northern Freight Train was stopped at Colburn, Idaho, on the other side of Sand Point, and Special Agent Harry Holtz, in checking the cars noticed a car door that wasn't sealed; that he noticed persons in the car, one of whom handed him a card which was the card of Dominic Constantine; that this train was going from Troy, Montana, to Hillyard, Washington; that the special agent directed the men to bring a pack sack which was in the car, in which pack sack was found a large quantity of morphine and cocaine, morphine sulphate and cocaine hydrochloride.

(R. pp. 13-14.)

At the close of such statement, attorney for the defendant moved the court for an order discharging the defendant, for the reason that the statement plainly indicates insufficient proof as to the crime alleged in the information.

(R. p. 15.)

During the course of the trial Mr. H. T. Holtz, over the objections of the counsel, was permitted to

testify as to the contents of a certain bill fold, as follows:

A. I asked them where they were going, and this man spoke up and said he was going to Spokane. I says, "Here's a good place to get out and start walking." He walked over toward the door. I had a flashlight on him, and he walked over toward the door and pulled out his bill fold and says, "I am a brakeman," and he handed me the bill fold.

MR. BARDSLEY: Have you that bill fold now?

A. No, I haven't.

MR. BARDSLEY: I object to any testimony as to what was upon that and what it contained.

THE COURT: Well, were you going to seek testimony as to its contents?

MR. MORROW: If the counsel desires it for the record, I will ask the question—

THE COURT: Did you see the bill fold?

A. Yes, sir; I had it in my hand.

THE COURT: Did you take it?

A. He handed it to me.

THE COURT: What did you do with it?

A. Read the name on it and handed it back to him.

THE COURT: And that is the last you have seen of it?

A. Yes, sir.

THE COURT: The objection is overruled.

MR. BARDSLEY: If the Court please, my reason for objecting to this would be compelling the introductioin of evidence against this defendant which we have no way of contradicting. This man might have been mistaken in reading that. We are entitled to the best evidence.

THE COURT: The general rule is that where a writing is presumably or prima facie in the possession of the defendant, the Government cannot call for it, because that would be the compelling of your evidence itself. Therefore secondary evidence may be resorted to. You may proceed.

MR. MORROW: Q. What was the contents of this bill fold that you read?

A. It contained a brakeman's card. On the card was "Dominic Constantine, Kalispell Division, Great Northern Railway, brakeman."

Q. How was the word "Constantine" spelled on that?

A. I couldn't say just how it was spelled now. I have seen it spelled two or three different ways since and before that time.

(R. pp. 17-18.)

Same witness was interrogated concerning the contents of a certain pack sack over the objections of counsel, as follows:

A. I went back and took the pack sack and took it up on the engine and unlocked it and examined the contents.

MR .BARDLSEY: I object to that testimony. Did you have a search warrant?

A. No, sir.

MR. BARDSLEY: I object to the testimony of this witness as to any contents of this. It is contrary to constitutional provisions prohibiting search and seizure without a warrant.

THE COUR:T Overruled.

MR. BARDSLEY: Is it necessary for me to take exceptions? I don't know whether it is or not. May I have exceptions to the rulings?

THE COURT: It will be understood that you have exceptions to all adverse rulings.

MR. MORROW: Handing you an article, I will ask you to state what it is.

A. A pack sack.

Q. Is there any way in which you can identify it with the pack sack to which you have just referred?

A. I put my mark on there in green ink.

Q. What is that mark?

A. My initial.

Q. "H"?

A. "H".

MR. MORROW: We will ask to have this marked as Government's Exhibit 1.

"There was a quantity of morphine and cocaine in the pack sack—the bottles were marked that. There was a grip in the pack sack."

And thereupon a certain grip was shown the witness who then testified as follows:

"That is the grip that was in the pack sack."

"This handle wasn't on here at that time. You couldn't carry it with that thing. I had a strap on here, a kind of rawhide wore out, and it broke as I was carrying it, because it was too heavy. The bottles I refer to were inside the grip."

(R. pp. 20-21.)

ON CROSS-EXAMINATION testified as follows:

Q. Now, as I understand your testimony, you found a car which was unlocked?

A. Yes, sir.

Q. And went to the door and looked in?

A. Yes, sir.

Q. And in that car was a man and a boy?

A. Yes, sir.

Q. And you told them to come out?

A. Yes, sir.

Q. And they started to come out?

A. Yes.

Q. And as they were coming out you noticed a pack sack back in the car?

A. Well, he came out with a pack sack, when he came out.

Q. Did he come out with a pack sack?

A. Yes, because I sent him back after it.

Q. When he came out, the man got up and came out?

A. He came to the door.

Q. And then you saw a pack sack back there?

A. Yes.

Q. And then you sent him back after the pack sack?

A. Yes, sir.

Q. Then he brought it out?

A. Yes, sir.

Q. At the time you sent him back for the pack sack did this man say anything to you?

A. Yes.

Q. What did he say?

MR. MORROW: That is objected to as hearsay.

THE COURT: Overruled.

A. He said, "I'm a brakeman."

Q. Did he say anything about the pack sack?

A. He said he didn't own it, didn't have any pack sack.

Q. You testified to that before Judge Rudkin?

A. I believe I did.

Q. And when you opened the door who was near this pack sack,—the boy or the man?

A. They were both up at one end of the car, and the pack sack was up in that end of the car.

Q. The boy was laying on the pack sack, was he not?

A. I couldn't say as to that.

Q. You don't remember that?

A. No, sir.

Q. Do you remember testifying to that fact before Judge Rudkin?

A. I don't remember of it. He may have been sitting on the pack sack. There was only about three feet between the side walls of the car and the pack sack on one side. It would be pretty close to the—

Q. This was a dark night?

A. Dark night—One or one-thirty in the morning.

Q. And how long were you there at that door?

A. Oh, just—I wouldn't say over a minute or a minute and a half or two minutes.

Q. A very short time?

A. A very short time, yes.

(R. pp. 23-24-25)

Witnesses Ed Thompson and M. L. Stickney were produced on behalf of the Government and testified that the train upon which the defendant was alleged to have been, arrived at Troy, Montana, on the evening of April 5th, 1921; that after its arrival they saw a man answering Constantines' description, carrying a black grip; that the testimony of all witnesses for the Government was to the effect that the train from which the defendant was taken by the officers, was going from Troy, Montana, to Spokane, Washington; that the defendant was ordered out of the train at Colburn, Idaho.

Other witnesses were called on behalf of the Government and testified that they were connected with the Great Northern Railway, one of whom had seen the defendant at Hillyard the next morning and the other had seen the same suit case on a previous occasion.

Fred A. Watt, Harold W. Cole, Albert A. Gatons, L. R. Watts, Harry V. Williamson and Harry W. Balaine, were called as witnesses on behalf of the Government and related a rather interesting trans-

action relative to the handling of the exhibits, after which the Government closed its case without any testimony as to whether or not the defendant had registered with the Collector of Internal Revenue his name and place of business, and place or places where such business was to be carried on; without showing or proving that Colburn, Idaho, is within the Northern Division, District of Idaho; without placing the exhibits, which had been identified, in evidence.

ASSIGNMENT OF ERRORS.

1. The Court erred in overruling defendant's demurrer interposed to said indictment in said cause. (R. pp. 12-13.)

2. That the Court erred in denying the defendant's motion for a discharge of the defendant, interposed at the close of the statement of the case on behalf of the Government. (R. p. 15.)

3. That the Court erred in overruling the defendant's objection to the testimony of H. T. Holtz, a witness on behalf of the Government in permitting said witness to testify as to the name he saw on a certain bill-fold, the proceedings relative thereto being fully set forth in defendant's bill of exceptions herein. (R. pp. 17-18.)

4. That the Court erred in permitting said witness to testify, over the objections of the defendant, to the contents of a certain bag seized without a

warrant, the proceedings thereto being fully set forth in defendant's bill of exceptions herein. (R. p. 20.)

5. That the Court erred in overruling the defendant's motion for a directed verdict at the close of the Government's case, which proceedings are fully set forth in defendant's bill of exceptions herein. (R. p. 39.)

6. That the Court erred in denying defendant's motion for a discharge of the defendant notwithstanding the verdict.

7. That the Court erred in denying the defendant's motion for a new trial.

8. That the Court erred in passing judgment. (R. p. 10.)

9. The evidence introduced by the Government is insufficient to support the verdict or judgment in that it fails to show that defendant committed the crime charged in the indictment and the testimony of the witnesses for the Government show that they observed defendant from Troy, Montana, where he boarded the train until his arrival at Colburn, Idaho, where he was taken from the train, and that he made no sale during that time, of narcotics.

ARGUMENT AND AUTHORITIES.

The defendant is accused of violating the so-called Harrison Act of December 17, 1914.

Section 1 is as follows:

On and after the first day of March, nineteen hundred and fifteen, every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away opium or coca leaves or any compound, manufacture, salt, derivative, or preparation thereof, shall register with the collector of internal revenue of the district his name or style, place of business, and place or places where such business is to be carried on: Provided, That the office, or if none, then the residence of any person shall be considered for the purposes of this Act to be his place of business. At the time of such registry and on or before the first day of July, annually thereafter, every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away any of the aforesaid drugs shall pay to the said collector a special tax at the rate of $1 per annum: Provided, That no employee of any person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away any of the aforesaid drugs, acting within the scope of his employment, shall be required to register or to pay the special tax provided by this section: Provided further, That the person who employs him shall have registered and paid the special tax as required by this section: Provided further, That officers of the United States Government who are lawfully engaged in making purchases of the above-named drugs for the various departments of the Army and Navy, the Public Health Service, and for Government hospitals and prisons, and officers of any State government, or of any county or municipality therein, who are lawfully engaged in making purchases of the above-named drugs for State, county or municipal hospitals or prisons,

and officials of any Territory or insular possession or the District of Columbia or of the United States who are lawfully engaged in making purchases of the above-named drugs for hospitals or prisons therein shall not be required to register and pay the special tax as herein required.

It shall be unlawful for any person required to register under the terms of this Act to produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away any of the aforesaid drugs without having registered and paid the special tax provided for in this section.

Section 2, (a) is as follows:

To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this Act in the course of his professional practice only: Provided, That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in this Act.

ASSIGNMENT NO. 1.

The information alleges that:

"On or about the 6th day of April, A. D. 1921, at Colburn, in Bonner County, Idaho, and in the Northern Division of the District of Idaho, Dominic

Constantine did then and there deal in, dispense, sell and distribute certain compounds and derivatives of opium and coca leaves, to-wit: morphine sulphate and cocaine hydrochloride, without first having registered with the Collector of Internal Revenue for the District of Idaho his name and place of business and place or places where such business was to be carried on, as required by law."

To this information a demurrer was interposed, which was overruled by the Court. The question presented being that the information does not allege that the defendant is not of the class exempted by the statute.

This question has been passed upon in the case of United States v. Woods, 224 Fed., page 278, the Court uses the following language:

> "Whenever an offense can be committed by only certain classes of persons, the indictment must expressly allege that accused is of those classes or it is fatally defective in substance."

and as the indictment in this case made no distinction, in our mind it is defective, and the failure to do so, fatal, notwithstanding the last paragraph and provision of Section 8 of said Act.

ASSIGNMENT NO. 2.

The Assistant United States Attorney, in making a statement to the jury, before the introduction of testimony, clearly indicated that the testimony did not prove a sale, as charged in the information, in

view of the fact that he made it clear that the defendant was seen near the train at Troy, Montana; that the train was stopped at Colburn, Idaho, and the defendant taken from the train. Our contention being that a sale could not be presumed under such circumstances, as the defendant can not be compelled to enter a State and thereby have jurisdiction conferred upon the Courts of that State, and burdened with a presumption.

ASSIGNMENT NO. 3.

H. T. Holtz was permitted to testify as to the contents of a certain bill-fold, over the objection of the defendant, and our contention is that where a party asserts for the first time at the trial, the contents of a purported instrument, such testimony is not admissable, and they should not be allowed to prove its contents by secondary evidence.

In the case of Clary v. O'Shea, 72 Minn. 105, 75 N. W. 115, 71 A. S. R. 465; that Court says:

> "To allow the one party to assert for the first time on the trial that a certain written instrument existed and was in the possession of the opposite party, and, because the latter denied that it ever existed, allow the former to prove the contents of the alleged instrument, without having given any notice to produce it, would open the door for perjury and surprise."

See also Boyd v. United States, 116 U. S. 616, 29 L. Ed. 746.

ASSIGNMENT NO. 4.

The Court permitted H. T. Holtz, witness for the Government, to testify relative to the contents of a certain pack sack, over the objection of counsel for defendant, which was as follows:

Q. Then what did you do?

A. I went back and took the pack sack and took it up on the engine and unlocked it and examined the contents.

MR. BARDSLEY: I object to that testimony. Did you have a search warrant?

A. No, sir.

MR. BARDSLEY: Was there a Government officer there with you?

A. No, sir.

MR. BARDSLEY: I object to the testimony of this witness as to any contents of this. It is contrary to constitutional provisions prohibiting search and seizure without a warrant.

THE COURT: Overruled.

MR. BARDSLEY: Is it necessary for me to take exceptions? I don't know whether it is or not. May I have exceptions to the rulings?

THE COURT: It will be understood that you have exceptions to all adverse rulings.

(R. p. 6.)

Article IV. of the Constitution of the United States, reads as follows:

> UNREASONABLE SEARCHES PROHIBITED.—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In the case of Purkey v. Mabey, 193 Pac. 79, the Supreme Court of Idaho uses the following language:

> "Article 1, Sec. 17, of the Constitution provides:
>
> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue without probable cause shown by affidavit, particularly describing the place to be searched and the person or thing to be seized."
>
> "The right protected by the above provision of our Constitution has been deemed of so great importance that a similar provision is found in the Constitution of the United States and in the Constitution of nearly every State in the Union. Under such constitutional provisions, it is uniformly held that the search warrant must conform strictly to the constitutional and statutory provisions providing for its issuance. It must contain a description of the premises to be searched. No discretioin must be left to the officer executing the warrant as to the premises which he is authorized to search."

See also, Youman v. Commonwealth of Kentucky, 13A. L. R., 1303; State v. Marxhausen, 3 A. L. R., 1505; Dukes v. United States, 275 Fed. 142; Holmes v. United States, 275 Fed. 49; Berry v. United States, 275 Fed. 680; United States v. Lydecker, 275 Fed. 976; United States v. Kelly, 277 Fed. Reporter, 485; Ganci v. United States, Fed. Reporter, Vol. 287. 60.

In the case of Kanellos v. United States, 282 Fed. Reporter, page 467, the Court says:

> "To give countenance to what was done here as a reason for denying to an accused the benefit of the protection of the constitutional amendments involved would, as stated by Mr. Justice Holmes (Silverthorne v. United States, 251 U. S. 385, 392, 40 Sup. Ct. 182, 183, 64 L. Ed. 319), be to reduce 'the Fourth Amendment to a form of words,' and as stated by Mr. Justice Day (Weeks v. United States, 232 U. S. 393, 34 Sup. Ct. 344, 58 L. Ed. 652, L. R. A. 1915 B 834, Ann. Cas. 1915 C, 1177):
>
> "The protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."
>
> The Supreme Court of the United States has frequently had to define the rights of an accused under the Fourth and Fifth Amendments, and has, with unvarying consistency, strongly upheld the amendments as necessary to the citizen's personal liberty. In one of the very recent cases, Gouled v. United States, 255 U. S. 298, 312, 313, 41 Sup. Ct. 261, 65 L. Ed., 647, Mr. Justice Clarke, speaking for the court said:

"It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in Boyd v. United States, 116 U. S. 616, in Weeks v. United States 232 U. S. 383, and in Silverthorne Lumber Co. v. United State 251 U. S. 385) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two amendments. The effect of the decisions cited is that such rights are declared to be indispensable to the full enjoyment of personal security, personal liberty and private property; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guarantees of the other fundamental rights of the individual citizen—the right to trial by jury, to the writ of habeas corpus, and to due process of law, it has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent a stealthy encroachment upon or gradual depreciatioin 'of the rights secured by them, by imperceptible practice of courts or by well intended, but mistakenly overzealous, executive officers.' 255 U. S. at pages 303, 304, 41 Sup. Ct. at page 263 (65 L. Ed. 647)."

ASSIGNMENTS NOS. 5, 6, 7, 8, AND 9.

We will argue the foregoing assignments as one, as they have to do with the insufficiency of the evidence to support the verdict.

THE EVIDENCE INTRODUCED ON THE PART OF THE GOVERNMENT, WAS INSUFFICIENT TO SUBMIT TO THE JURY THE QUESTIONS OF WHETHER

OR NOT DEFENDANT WAS GUILTY OF THE CRIME CHARGED, AND MOREOVER, AFFIRMATIVELY SHOWED THAT THE DEFENDANT WAS NOT GUILTY.

Section 8 of the Act upon which the indictment in this case is based, provides that possession or control of narcotics, shall be presumptive evidence of a sale. Had the Government proved that the defendant was taken out of a box car with a large quantity of narcotics in his possession, there might have been sufficient evidence to raise a presumption that he was selling the same, had the Government not by its own witness showed that such sale on the part of the defendant within the jurisdiction of this court, was utterly impossible.

> "A presumption of law is a rule of law announcing a definite probative weight attached by jurisprudence to a proposition of logic. It is an assumption made by the law that a strong inference of fact is prima facie correct, and will therefore sustain the burden of evidence, until conflicting facts on the point are shown. Where such evidence is introduced, the presumption at law is functus officio and drops out of sight."

22 Corpus Juris, page 124, paragraph 61, with cases and foot notes 51 and 52.

It is our contention that the undisputed testimony of each and every one of the witnesses for the Government, showed conclusively that a sale could not

have been made within the jurisdiction of the court, and thus under the rule of law above cited, entirely overcame any presumption arising from the alleged possession by defendant of narcotics at the time in question.

H. T. Holtz was the first witness produced by the Government. He testified that on the occasion in question, he was a special agent of the Great Northern Railway Company in the district between Spokane and Troy, Montana, and was with a freight train on the night of the 5th of April and the morning of the 6th of April, 1921, which train was at that time headed into a sidetrack at Colburn, Idaho, in order to allow a passenger train to pass. Holtz further stated that this train stopped at Colburn shortly after midnight on the morning of April 6th, and that walking to a freight car that was closed, he opened the door and saw the defendant. (R. pp. 16 and 17.)

The second witness called by the Government was Ed Thompson, also a special agent for the Great Northern, who came to Troy, Montana, the evening of the 5th of April, 1921, in charge of the freight train. He got into Troy at 5:30 P. M. Montana time. At that time he saw the defendant, or at least a man answering his description, with a black grip. (R. pp. 26 and 27.)

The third witness called by the Government was M. L. Stickney, who was in the employ of the Great

Northern Railroad at the time in question, and he also testified that the train came into Troy, Montana, in the evening of April 5, 1921. He saw Dominic Constantine, or a man answering his description, with a black grip at that time.

The fourth witness, William De Long, who was at that time employed by the railroad company as yard clerk, saw Dominic Constantine at Hillyard, Washington, on the morning of April 6th, 1921, at about 7:30 A. M., and saw the train in question. (R. pp. 28 and 29.)

The fifth witness called by the Government was William H. Pratt, who at the time in question, was the special agent of the Great Northern Railroad Company and stationed at Spokane. He testified merely to an acquaintanceship with Constantine, and recognized the black grip which he had seen on previous occasions. (R. pp. 29 and 30.)

The sixth witness was Fred A. Watt, a witness in behalf of the Government, who testified to nothing else except the custody of the grip and narcotics alleged to have been taken from Constantine at the time of his capture. (R. pp. 30-32.)

The seventh witness of the Government was Harold W. Cole, a federal narcotic agent, who testified to nothing further than quantity and nature and custody of the goods taken away from Constantine and their value. (R. pp. 32-35.)

The eighth witness was Albert E. Gatons, also a

federal narcotic agent, who testified as to the custody of the bottles taken from Constantine. (R. pp. 35-36.)

The ninth witness, Mr. L. R. Watts, another federal narcotic agent, also testified concerning the custody of the narcotics after their alleged taking from the defendant, and the testimony of Harry V. Williamson, another government narcotic agent, was to the same effect. (R. pp. 36-38.)

Harry W. Ballaine, the next witness produced by the Government and also a federal narcotic inspector, testified to nothing further than to identify the exhibits in the case. (R. pp. 38-39.)

Thus the Court must see that the Government proved conclusively by their own witnesses and undisputed by any other witnesses, that on the evening of April 5, 1921, at Troy, Montana, and without the jurisdiction of this court, the defendant boarded the train and stayed with the same until it arrived at Colburn, and did not leave the freight car in which he was riding until taken therefrom by the officers. This shows conclusively that a sale was not made by the defendant subsequent to boarding the train at Troy, Montana, and that if made at all, it was made in the jurisdiction other than the District of Idaho. That the sale was not made at Colburn, Idaho, is also conclusively established, as the witnesses for the Government testified that they themselves, after the train stopped, opened the

door of the freight car, found Constantine there and took away the narcotics alleged to have been in his possession.

At the close of the State's case, the defendant moved for a discharge of the defendant, which motion was denied.

In State v. Sullivan, 17 A. L. R. 905, that court holds:

> "Proof of the charge in criminal causes involves the proof of two distinct propositions—first, that the act itself was done, and secondly, that it was done by the persons charged, and and no others."

Also in the same case, on the same page the Court states:

> "The general rule as to the burden of proof in criminal cases required the state to prove beyond a reasonable doubt the offense charged in the information; and, if the proof fails to establish any of the essential elements necessary to constitute a crime, the defendant is entitled to an acquittal. 8 R. C. L. Sec. 163, p. 170; State v. Young, 52 Or. 227, 18 L. R. A. (NS) 688, 132 Am. St. Rep. 689, 96 Pac. 1067; Hollywood v. State, 19 Wyo. 493, 120 Pac. 47v, 122 Pac. 588, Ann. Cas. 1913 E, 218."

We contend that the State failed to prove the allegations as contained in the indictment, in that they failed to prove a sale and failed to prove that the defendant did not register with the Collector of Internal Revenue for the District of Idaho.

The Supreme Court in the case of Samuel M. Clyatt v. United States, 49 Law Ed., 726, on page 732, uses the following language:

> "No matter how severe may be the condemnation which is due to the conduct of a party charged with a criminal offense, it is the imperative duty of a court to see that all the elements of his crime are proved, or at least that testimony is offered which justifies a jury in finding those elements. Only in the exact administration of the law will justice in the long run be done, and the confidence of the public in such administration be maintained."

In State v. Marcoe, 193 Fed. Rep., 80, the Supreme Court of Idaho, uses the following language:

> "In order to sustain a conviction based solely on circumstantial evidence—
> "the circumstances must be consistent with the guilt of the defendant and inconsistent with his innocence, and incapable of explanation on any other reasonable hypothesis than that of guilt." Broshears v. State (Okl. Cr. App.) 187 Pac. 254.

If the evidence can be reconciled either with the theory of innocence or of guilt, the law requires that the theory of innocence be adopted. Vernon v. U. S., 146 Fed. 121, 76 C. C. A. 547; People v. Ward, 105 Cal. 335, 38 Pac. 945; Smith v. First Nat. Bank, 99 Mass. 605, 97 Am. Dec. 59; State v. Vandewater (Iowa) 176 N. W. 883; Robinson v. State, 188 Ind. 467, 124 N. E. 489; Tolbert v. State (Tex. Cr. App.) 217 S. W. 153; Wales v. State (Tex. Cr. App.) 217 S. W. 384."

In Brenner v. United States, 287 Fed. 636, on page 639, the Court states:

> "It is a general rule in reference to an indictment that all material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly, and not inferentially, or by way of recital."

In the case of State v. Frey (Kansas) Pac. Rep. Vol. 208, No. 2 Adv. Sheets, 547, the Court states:

> "Courts expression of serious doubt as to conviction before verdict immaterial; duty of court to set verdict aside when in doubt as to sufficiency of evidence to support it."

In which case they cite the case of Butler v. Milner, 166 Pac. 478, as follows:

> "The sole function of the jury is to return a verdict, but the matter does not rest there; before a judgment can be rightly entered upon a verdict the judge of the court must exercise a judicial function and approve or disapprove the verdict. It cannot be doubted that frequently miscarriage of justice would be avoided by a more vigorous exercise of the trial courts discretion in granting new trials, and it is doubtful if a weightier responsibility rests upon the Judge of the District Court than the proper exercise of this part of his judicial functions."

While we are unalterably opposed to the traffic in narcotics, and by reason of the views we have against the offenders thereof, we feel that it is our

duty and the duty of those having the enforcement of these laws, to see that a person charged with this grave offense is given a fair and impartial trial, and not convicted upon suspicion; and we do contend that the defendant has not been afforded the privileges granted to him by the Constitution; and that the benefit of a reasonable doubt, provided by law, has not been extended to the defendant; and there is such a grave doubt in our minds, after hearing the testimony of the witnesses for the Government, to insist before this Court that the Government be required to produce such evidence as will leave no doubt as to the guilt of defendant on the charge as contained in the information. We respectfully submit that the defendant is entitled to a discharge for lack of evidence as to the alleged crime.

Respectfully submitted,

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and
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